SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER.

WILLIAM B. COLLINS,
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HARRIET V. PENCE,
Petitioner and Appellee Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellant Below.

BRIEF OF PETITIONER.

I.

Opinions of Courts Below.

The opinions in the District Court are set forth at pages 219 and 223 of the record but are not reported. The opinion of the Circuit Court of Appeals is set forth at pages 246 to 253 of the record and has been reported in 121 F. (2d) pages 804 to 809.

II.

Jurisdiction.

This has already been stated in the preceding petition under II (pp. 3 to 6) which is hereby adopted and made a part of this brief.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1 to 3) which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the District Court's ruling on defendant's motion for directed verdict.

2. The Circuit Court of Appeals erred in assuming that it had the power to disturb the discretion of the District Court exercised on defendant-respondent's motion for directed verdict, in the absence of an abuse of such discretion by said District Court.

3. The Circuit Court of Appeals erred in not granting petitioner's motion in said court to dismiss the defendant-respondent's appeal, because that court never acquired jurisdiction, no statement of points having been filed in compliance with Rule 9 of said court.

V. ARGUMENT.

Summary of the Argument.

Point A. The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury.

Point B. The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50 b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

Point C. Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that court never acquired jurisdiction.

POINT A.

The issue presented by the conflicting evidence in the record in this case was a case of fact for the jury.

In addition to the argument on this point set forth on pages 11 to 21 in our Brief on petition for the writ of certiorari, we wish to add the following.

The decision of the Circuit Court of Appeals seems to be based largely on the fact that Pence had made statements after re-instatement conflicting with statements made in said application. The Circuit Court states, "Certainly, it appears to us that the government is entitled to rely upon statements furnished by Pence for a different purpose, to prove the falsity of the information furnished for the purpose of re-instating the policy."

Pence v. *United States*, 121 F. 2d 804, 807.

By "rely upon statements" the Circuit Court really means that these statements prove the falsity of the statements in the application for re-instatement. Said court actually holds that these statements prove such falsity conclusively. Wouldn't it be just as logical to say that the statements made in the application for re-instatement prove conclusively the falsity of the statements made by Pence in his applications subsequent to re-instatement? All the facts and circumstances in this entire record should be considered in any determination of the question of whether Pence made false statements in his application for re-instatement. We submit that no mere statement can ever prove as a fact that which may or may not be a fact. Where we have conflicting statements, the decision as to which statements were false and which were true, is a clear cut

decision of a question of fact. When the Circuit Court decides this question of fact, is it not directly depriving the plaintiff of her right to a jury trial guaranteed by the Seventh Amendment to the Constitution of the United States?

The correct decision is one of two alternatives; both must be considered in arriving at any decision; but the court directly brushes aside and excludes one alternative—that the statements of Pence in the applications subsequent to re-instatement are false and are shown to be false by all the other evidence in the record—and elects without argument or discussion to stand upon the other alternative. It directly decides with positive finality that the statements in the application for re-instatement are false. It assumes that certain statements are true and because of this assumption finds that other statements are false. It decides a fact.

It has been held in Wisconsin that statements obtained from a party on an adverse examination or otherwise prior to the trial which are at variance or even in conflict with the testimony in the trial present at most a contradictory state in the evidence and it is within the province of the jury to decide which statement is correct.

Schweitzer v. *Fox*, 226 Wis. 26, 32 and cases there cited.

We believe the District Court in the case at Bar was right when it stated as quoted by the Circuit Court regarding these subsequent statements as follows:

> " 'They were proper evidence from which the Jury might have come to the conclusion that Dr. Pence answered falsely questions 7 and 11 in his application for re-instatement' ".
>
> *Pence* v. *United States*, 121 F. (2d) 804, 807.

The district court would permit the Jury and did permit the Jury to exercise its constitutional function. The circuit court would not. So we submit the circuit court was

in error when it continued: "We do not agree with this interpretation of the evidence. It appears to us that the facts pointed out above prove beyond question, not that the insured *might have* answered falsely, but that he *did* answer falsely in the particulars mentioned."

Pence v. *United States*, 121 F. (2d) 804, 807.

But standing in the way of this conclusion of the circuit court were several medical reports by government doctors made after Pence was examined on his applications subsequent to re-instatement. (The court at this stage of the argument omits mention of all medical examinations prior to the re-instatement of July 1, 1927 and to the most important medical report in the case—the one of Dr. Joseph Plant on the application for re-instatement dated July 25, 1927.) These reports show that Pence did not have the diseases he claimed. The show that the statements made in the applications subsequent to his re-instatement were false. They tend to prove that the statements made in the application were true. Having decided the fact by electing to stand on the one alternative—how was this evidence met by the Circuit Court of Appeals? We quote:

> "It must be remembered that to be entitled to the relief claimed, Pence had to be *disabled* by the diseases and ailments with which he was afflicted, to whatever extent required by the regulations, while to be disentitled to the re-instatement of the policy, he had merely to *have* the diseases and ailments."
>
> *Pence* v. *United States*, 121 F. (2d) 804, 807.

We did not and could not introduce any reports of boards which do pass on the percentage of disability required by regulations for relief sought. We could not do that under the very decisions of the circuit court. We tried to do so and were confronted with decisions (R. 85, 86, 87, 88).

United States v. *Golden*, 34 F. (2d) 367, 370;
Runkle v. *United States*, 42 F. (2d) 804, 807;

Third National Bank v. United States, 53 F. (2d) 599, 602.

We introduced the medical reports of government doctors who examined Pence on his applications subsequent to re-instatement.

They deal specifically with the presence or absence of the ailments claimed in Pence's applications—not with any percentage of disability. These medical reports differ from reports of boards in that they do not consider any percentage of disability. Pence claimed principally in all earlier applications that he had acute sinusitis and myocarditis. The medical reports down to Nov. 12, 1930 found he didn't have either of them. There is not a word about percentage of disability in any medical report we introduced as an exhibit. We submit that the part of the circuit court's decision above quoted does not meet the evidence of the medical reports at all. These reports show that Pence did not have at all—in any percentage whatever—any of the diseases he claimed. They tend to show that the statements in his application for re-instatement are true. Taken with the medical examinations prior to re-instatement and all the facts in the record in this case the issue was clearly a Jury question and the verdict of the Jury is supported by substantial evidence in the record.

But aside from these statements in medical reports on examinations subsequent to re-instatement how can the Court reconcile or justify the quoted part of its decision with the medical reports of Pence's condition in all the examinations prior to his re-instatement of July 1st, 1927? How can the Court utterly disregard and entirely ignore the report of the medical examination of Dr. Jos. H. Plant on June 25th, 1927? This was made by a government doctor four days after Pence's application for re-instatement and was had to determine Pence's state of health at the time of re-instatement and because of the application for

re-instatement, Dr. Jos. H. Plant after examination recommended Pence as a "1st class risk" (R. 173; Plaintiff's Exhibit 3, Question 21). We submit that this report alone makes the issue a jury question.

In the "Medical Examiner's Report" filled out by Dr. Plant, question 7 is answered as follows: "7. After examination do you find any abnormality of the heart? No. Is it irregular? No. Does it intermit? No. Is there a murmur? No. (if any heart disability is found or suspected, complete special heart examination on reverse side.)" Plaintiff's Ex. 3; R. 172.

Why did the circuit court ignore the results of the examinations of Dr. A. R. Pierce and Dr. Royal F. French in Mar., 1925, and Nov., 1924? (Plff's. Ex. 8, R. 182, 183) Why ignore the fact that at the time of his discharge on Jan. 9, 1919, Pence claimed no disease or disability and the government doctors found none? This was only a month or two after the alleged myocarditis at camp (Plff's. Ex. 9, R. 184), upon which the circuit court seems to rely.

Pence v. *United States*, 121 F. (2d) 804, 807.

Are not all these things and many others in this record substantial evidence which support the jury's verdict for the plaintiff? In the light of the rules of law governing—that in considering defendant's motion for directed verdict, all undisputed facts proved by petitioner and all reasonable inferences, deductions and conclusions to be drawn therefrom which are favorable to the plaintiff against whom the motion is made are to be regarded as true—

Strochman v. *Mut. Life Ins. Co.*, 300 U. S. 435, 440;
Lumbra v. *United States*, 290 U. S. 550, 553;
Gunning v. *Cooley*, 281 U. S. 90, 94;
Richmond & Danville R. R. v. *Powers*, 149 U. S. 43, 45;
Halliday v. *United States*, 62 Sup. Ct. 438, 441 (Jan. 19, 1942)

did not the circuit court err in disturbing the discretion of the district court and ordering said court to grant the motion for a directed verdict?

POINT B.

The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

We have pointed out that there was no abuse of discretion by the trial court. The decision of the Circuit Court of Appeals virtually admits this (p. 21, 22 Brief on Petition). Does an appellate court have a right to disturb the discretion, no abuse in its exercise appearing? The province of appellate courts is generally limited to the correction of errors of law and, as a general rule, they cannot review the findings of fact of juries or of trial courts. The probative force of evidence is for the consideration of the jury, who are the triers of fact in the court below, and the appellate court cannot consider the weight of the evidence nor the credibility of witnesses. Where there is any evidence to support the findings or the verdict or where the evidence is in conflict and would support a finding either way, the verdict of a jury based thereon and approved by the trial court will not be disturbed unless there is an entire lack of substantial evidence either direct or inferential. The mere difference of opinion between the reviewing court and the trial judge or the jury regarding the weight of the evidence or the credibility of witnesses furnishes no ground for disturbing the discretion of the trial court where the exercise of that discretion is free from abuse and there is substantial evidence to sustain the discretion of the trial court and the verdict of the jury.

4 C. J., #2830 Appeal and Error, pp. 843, 845.

Where the trial court is vested with discretion on a motion to direct a verdict and has exercised that discretion it will not be disturbed on appeal unless such discretion has been abused.

5 C. J. S. #1612 pp. 1612, 1613.

Graves v. *Mount Vernon T. Co.*, 69 F. (2d) 101 (2nd Cir.)

Pilot Life Ins. Co. v. *Habis*, 90 F. (2d) 842, 844 (4th Cir.)

Hartford-Empire Co. v. *Obearnestor Glass Co.*, 95 F. (2d) 414, 424. (8th Cir.)

In the last case above cited (*Hartford-Empire Co.* v. *Obearnestor Co.*, 95 F. (2d) 414, 424), the court in referring to whether there was an abuse in the exercise of discretion by the trial court states:

> "This guiding principle for an appellate court is not what it may think the jury ought to have done, or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict from the evidence adduced."
>
> 4 C. J. #2830 pp. 849 to 856.

This Court has held that it is without authority to disturb a judgment upon the grounds that the damages are excessive and that whether the order overruling the motion for a new trial, based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record.

Wabash Ry. Co. v. *McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 934.

This Court has always held that the discretion to pass upon the question of excessive damages belongs to the trial court; that when the trial court reviews the case and

refuses to disturb the verdict and finds that the jury performed their duty impartially and justly it will not disturb the discretion of the trial court. It has further held that whether or not the action of the trial court in overruling a motion for a new trial was erroneous "our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a reexamination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties."

Railroad Co. v. *Fraloff*, 100 U. S. 24, 31.

This Court has held that the district court's determination of its jurisdiction in an action for libel was the exercise of a discretion not to be disturbed upon appeal unless abused.

> "The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court, the exercise of its discretion may not be disturbed unless abused. The Belgenland, 114 U. S. 355, 368; The Maggie Hammond, 19 Wall. 435, 457."
>
> *Charter Shipping Co. Ltd.* v. *Bowring, Jones & Tidy Ltd*, 281 U. S. 515, 517.
>
> See also *Gen. Inv. Co.* v. *Lake S. R. R.*, 260 U. S. 261, 281.
>
> *Newton* v. *Con. Gas Co.*, 258 U. S. 165, 177, 178.

POINT C.

Petitioner's motion to dismiss respondent's appeal should have been granted by the Circuit Court because that court never acquired jurisdiction.

We pointed out in our brief on Petition for Writ that respondent failed to comply with Rule 9, subd. 1, of the Rules of the Circuit Court of Appeals for the Seventh Circuit (Brief on Pet. pp. 24 to 27). We do not care to add to the argument on this point. Although we do not

abandon this point we prefer to rest our cause on the merits, but we believe that the court below as well as the litigants were bound by this rule.

Conclusion.

It is therefore respectfully submitted that this Court should reverse the decision of the Circuit Court of Appeals and reinstate the judgment of the District Court and grant such other relief as it may deem just.

Respectfully submitted,

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